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The Lessened Lis Pendens

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From its once lofty perch, how low the mighty lis pendens has fallen. Ever since its inception in the common law glory of easy recordability in the 1850s, it has been successively whittled away by the legislature: First, the legislature permitted expungement; then reversed the burden of proof and lowered the standard from clear and convincing to simple preponderance; then moved from a "good faith and proper purpose" standard for survival to the stricter one of probable validity; and, finally, permitted third party intervention, attorney fees, and restrictions on the absolute litigation privilege.

The legislature has been silent on the question of what constitutes a proper real property claim for purposes of the lis pendens, but our courts have taken the hint and have been equally diligent in confining its scope and repudiating the more creative theories of plaintiffs' counsel, as demonstrated by *Palmer v Zaklama* (2003) 109 CA4th 1367, 1 CR2d 116, and *Kirkeby v Superior Court* (2003) 109 CA4th 1275, 135 CR2d 861, reported at pp and , respectively.

In earlier days, the plaintiffs in both of these cases might have succeeded in their attempts to tie up the properties they were after. Although the behavior of the Zaklamas in *Palmer* seems fairly excessive, the house they were reaching for had been their home and had been sold out from under them for a song at an execution sale (a $200,000 house sold to satisfy a $9000 judgment). One can understand their belief that getting the house back was the only meaningful protection. However, because we have a sensible, albeit counterintuitive, rule that execution sales to third parties are absolute even when founded on defective judgments, the Zaklamas' attempt to retrieve the property, instead of merely reversing the judgment, had to lose. The policy that execution sales are final may make sense, but it often penalizes the merely inattentive or ignorant judgment debtor.

In *Kirkeby*, the plaintiff's desire to record a lis pendens while he was attacking a fraudulent conveyance of his judgment debtor's real property was even more understandable. After all, since the ipso facto purpose of a fraudulent conveyance is to put the property out of the judgment creditor's reach, the mere ability to set that conveyance aside does little good if the bad guys can simply transfer it a second time as the creditor plays an endlessly losing game of catch up with them. But when the underlying claim is only for money and the real estate is sought for the sole purpose of having something to sell on execution to satisfy a money judgment, then it, too, is no longer a real property claim—it is as unacceptable as the now-repudiated theory that a lis pendens lies when the defendant used wrongly gotten funds to buy real estate, thereby subjecting it to a potential constructive trust. In both *Palmer* and *Kirkeby,* the plaintiffs failed to satisfy the judiciary's emerging inclination to focus—often with a jaundiced eye—on the underlying issues. (See, for example, *BGJ Assocs., LLC v Superior Court* (1999) 75 CA4th 952, 89 CR2d 693, reported in 23 CEB RPLR 65 (Jan. 2000), in which an underlying constructive trust claim based on a joint venture to acquire real estate failed to qualify as a real property claim because the specific performance sought was only "appended" onto what was essentially a fraud action for

damages.) The underlying actions might succeed, but meanwhile the lis pendens "notices" will have been expunged, limiting the plaintiffs to a strictly monetary recourse if they do prevail.

In these cases, the plaintiffs' attempts to obtain a lis pendens were even worse than ineffective; they turned out to be downright dangerous: Kirkeby was held liable for the defendants' attorney fees, and the Zaklamas had to pay compensatory damages (covering not only the defendant's costs, but also the decline in market value) as well as punitive damages. The very convenience of the lis pendens—the ability to merely identify a piece of real estate in a complaint and then record against it—is what has now led it to backfire, and perhaps hurt more than it helps.

What has brought about the backlash is that the lis pendens is not only a prejudgment remedy—available before the merits have been decided—it is also a self-help remedy, meaning that no official has taken the slightest look at it before it is recorded. No other litigational step is so easy and so powerful. As we all know, abuse in such cases is tempting and inevitable. To stop the abuse inevitably means to punish the abusers as well as some nearby hangers-on.

The problem of the too-available lis pendens might be solved in various ways. The legislature could add a lot of specifics, attempting to resolve all issues in advance, as it does for nonjudicial foreclosures. Or, it could interpose a threshold judicial review, as is done for attachments and TROs. But those remedies would require more effort and planning than anyone is likely to undertake. Permitting the courts to penalize abusers by making them pay might be the most effective technique in any event (as well as being the easiest, since we are already there).

Given the current judicial disposition, attorneys should advise their clients to think twice before recording that lis pendens. The pleasure of tying up the property may cost more than it's worth.